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Supreme Court of the United States

October Term, 1937

No. 181

A. HOWARD MYERS *et al.*, Individually and as the National Labor Relations Board,

Petitioners,

v.

BETHLEHEM SHIPBUILDING CORPORATION, LTD.,

Respondent.

BRIEF ON BEHALF OF THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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August 11, 1937.

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BRIEF ON BEHALF OF THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The memorandum of the District Court for the District of Massachusetts upon the granting of the preliminary injunction (R., p. 117) is unreported. The opinion of the District Court upon the motion of the petitioners to dismiss the bill of complaint, which, as petitioners state, is not involved in this appeal, is reported in 15 F. Supp. 915. The opinion in the Circuit Court of Appeals for the First Circuit (R., p. 229) with respect to which certiorari is sought is reported in 88 F. (2d) 154 and the opinion of said Court (hereinafter called the Court of Appeals) denying the

motion of the petitioners for leave to file a second petition for rehearing (R., p. 242) has not yet been reported.

JURISDICTION

The decree of the Court of Appeals was entered February 12, 1937 (R., p. 232). A petition for rehearing (R., p. 232) was denied by the Court of Appeals on April 5, 1937 (R., p. 236), and leave to file the above-mentioned second petition for rehearing (R., p. 236), made after the decisions of this Court rendered April 12, 1937, in the five cases* involving the National Labor Relations Act (hereinafter called the Act†), was denied on May 13, 1937 (R., p. 243). Jurisdiction of this Court is invoked by the petitioners under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.**

QUESTION PRESENTED

The question involved in this suit on the petition for certiorari now before this Court is whether the District Court abused its discretion or violated any rule of equity in granting the preliminary injunction against the holding

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*_The Associated Press_ v. _National Labor Relations Board,_ (No. 365, October Term, 1936); 57 Sup. Ct. 650; _National Labor Relations Board_ v. _Jones & Laughlin Steel Corporation,_ (No. 419, October Term, 1936); 57 Sup. Ct. 615; _National Labor Relations Board_ v. _Fruehauf Trailer Co.,_ (Nos. 420 and 421, October Term, 1936); 57 Sup. Ct. 642; _National Labor Relations Board_ v. _Friedman-Harry Marks Clothing Co., Inc.,_ (Nos. 422 and 423, October Term, 1936); 57 Sup. Ct. 645; _Washington, Virginia and Maryland Coach Company_ v. _National Labor Relations Board,_ (No. 469, October Term, 1936); 57 Sup. Ct. 648.

†July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. §§151-166, incl.

**Mar. 3, 1891, c. 517, §6, 26 Stat. 828; Mar. 3, 1911, c. 231, §240, 36 Stat. 1157; Feb. 13, 1925, c. 229, §1, 43 Stat. 938; 28 U. S. C. 347(a).

by the petitioners of a hearing (hereinafter called the scheduled hearing) for the purpose of determining whether or not the respondent, Bethlehem Shipbuilding Corporation, Ltd. (hereinafter called the Shipbuilding Corporation), has engaged at its Fore River Plant in any so-called "unfair labor practices" under the Act.

STATUTE AND REGULATIONS INVOLVED

The Act involved is the National Labor Relations Act which appears in the record (pp. 17-27 of the pamphlet following R., p. 214). The Rules and Regulations of the National Labor Relations Board (hereinafter called the Labor Board) which are applicable likewise appear in the record as Exhibit A-2 to the bill of complaint (R., pp. 35-36).

STATEMENT

In accordance with the provisions of Rule 27 of the Rules of this Court, we set forth the following corrections of and additions to the statement contained in the petition for certiorari:

The Shipbuilding Corporation instituted this suit by filing its bill of complaint in equity for an injunction (and petition for a declaratory judgment) against the holding by the petitioners of the scheduled hearing. The petitioner Lyons, who had been designated to act as Trial Examiner for the Labor Board, was personally served with process within the jurisdiction of the District Court,* as were also the other petitioners, Myers and Blake (R., p. 60).

*The statement to the contrary in the petition (p. 5) is incorrect.

This suit was heard in the District Court on the sworn bill of complaint and affidavits including those filed by various officials and employees of the Shipbuilding Corporation. It was stipulated in the District Court that the affidavits filed in the suit of *MacKenzie, et al.* v. *Myers, et al.* (No. 182 on petition for writ of certiorari to this Court) brought by employees of the Shipbuilding Corporation against the petitioners and heard with this suit in the District Court might also be considered in this suit (R., p. 112).

In the bill of complaint the Shipbuilding Corporation set forth in full the facts regarding the business conducted by it at the plant at which the Labor Board alleges that the Shipbuilding Corporation has been engaged in unfair labor practices (hereinafter called the Fore River Plant) and set forth the pertinent facts regarding its relations with its employees there. The Fore River Plant is the only plant involved in this suit.

The District Court on the granting of the preliminary injunction found all of the facts alleged in the bill of complaint (as distinguished from statements and conclusions of law) to be true (R. p. 111).

The Fore River Plant is a complete and independent manufacturing plant for the designing and building of vessels of every type and kind (Bill, par. 6, R., p. 5; Aff. Gould R., pp. 89-90); and the vessels and products built at the Fore River Plant are built entirely on specific contract (Bill, pars. 7 and 8, pp. 6-7). In designing and building vessels at said Plant it is necessary that the Shipbuilding Corporation, and the Shipbuilding Corporation does, fabricate and shape in its shops especially for each vessel built all materials used therein and also builds for the most part the boilers and main propelling machinery for each such vessel; and the finished vessels bear no

resemblance to the materials used in building them and are of a far greater value than such materials, the cost of such materials representing less than half of the cost of building such vessels, the increase in value being due to the manufacturing, fabricating and building operations performed by the Shipbuilding Corporation at said Plant (Bill, par. 8, p. 7; Aff. Gould, R., pp. 88-89).

These vessels and other products are all delivered to the purchasers at the Fore River Plant (Bill par. 8, R., p. 7).

The bill of complaint alleges that neither the transaction of the business of the Shipbuilding Corporation at the Fore River Plant nor its relations with its employees with respect thereto constitute interstate commerce; that they do not directly burden or obstruct such commerce or the free flow thereof; that they do not tend to lead, or lead, to labor disputes; that they do not burden or obstruct such commerce, or the free flow thereof, or tend to lead to labor disputes burdening or obstructing such commerce or the free flow thereof; that such transactions do not occur, or such relations exist, in the course or current of interstate commerce, nor are they a part of the operations of instrumentalities of such commerce (Bill, par. 22, R., p. 21).

The District Court also found to be true all of the allegations of fact in the bill of complaint filed by employees in No. 182, which among other things alleges that the employees of the Shipbuilding Corporation at the Fore River Plant were engaged wholly in intrastate activities which did not burden, obstruct or affect interstate commerce (R., pp. 111, 219).

In March, 1923, the Plan of Employees' Representation, which is in effect at the Fore River Plant at the present time as it has been amended from time to time by the employees, was adopted. Said Plan (hereinafter called the

Plan) is operated entirely by the employees without any domination, interference, intimidation or coercion on the part of the Shipbuilding Corporation. Uncontradicted affidavits both by officials of the Shipbuilding Corporation and by employees at the Fore River Plant, who are in a position to know, demonstrate the fact that the Shipbuilding Corporation has not dominated or interfered with its employees in any way at any time up to the time of the hearing in this suit (Bill, pars. 20-21, R., pp. 19-20; Aff. Wakeman, R., pp. 107-108; MacKenzie, R., pp. 108, 167-168; McDermott, R., pp. 108, 174-175).

Prior to March, 1923, when the Plan was adopted at the Fore River Plant, labor conditions had been bad. Particularly during the years from the period of the World War until the Plan went into effect there were intermittent labor disputes and frequent strikes and walkouts by groups of employees in various sections and departments of the Fore River Plant, with the result that the efficiency of the employees there was impaired and thereby operations were interfered with and in general conditions were unsettled and operations impeded and the existence of pleasant and harmonious relations between the Shipbuilding Corporation and its employees was prevented (Aff. Gould, R. pp. 90-91; MacKenzie, R., pp. 108, 168; McDermott, R., pp. 108, 173).

A very marked change took place in the labor conditions among the employees at the Fore River Plant almost immediately upon the adoption of the Plan, and, in marked contrast to the conditions which existed at the Fore River Plant during the period just described above, there have been no labor disturbances or labor trouble of any nature whatsoever at the Fore River Plant since the adoption of the Plan. All questions concerning rates of pay, wages,

hours of employment and other conditions of employment and all grievances and other questions of interest to employees have been expeditiously and satisfactorily settled from time to time through collective bargaining between the management and the Employees' Representatives elected for the purpose under the Plan by the employees at the Fore River Plant voting in Nominations (primaries) and Elections by secret ballot. As a result of the operations of the Plan since 1923, in almost constantly increasing measure, there have existed and there now exist at the Fore River Plant pleasant, friendly and harmonious relations between the Shipbuilding Corporation and its employees (Bill, pars. 15, 19, R., pp. 13, 17; Affs. Gould, R., p. 91; Hannabury, R., pp. 108, 177-178; Harvey, R., pp. 108, 171-172).

Such Employees' Representatives, who are elected for the purpose of representing the employees in collective bargaining, were elected by the votes of over 96% of the employees eligible under the Plan to vote who were at the Plant on the day of the Election, and such employees represented practically all of the employees of the Shipbuilding Corporation at the Fore River Plant* (Bill, par. 21, R. p. 20).

In 1934 and 1935 the predecessor of the Labor Board, in existence under Public Resolution 44—73rd Congress† (hereinafter called the Old Labor Board) conducted a proceeding instituted on the complaint of Local No. 5 of the

*The record shows that 96% or 97% and 97.2%, respectively, cast good ballots that were counted in March, 1935 and March, 1936, respectively (Aff. Barker, R., pp. 108, 179; Supp. Aff. Barker, R., pp. 110, 188). The record does not, of course, show beyond 1936. It is a fact, however, that in March, 1937, 98% of the employees cast good ballots that were counted.

†June 16, 1933, c. 90, Title I, 48 Stat. 195.

Industrial Union of Marine and Shipbuilding Workers of America, the complaining party upon whose charge the complaint before the Labor Board involved in this suit is based (Bill, par. 16, R., pp. 13-14; Aff. Collins, R., pp. 102-103). The proceeding on that complaint and the decision of the Old Labor Board thereon after lengthy hearings (hereinafter called the First Fore River Case) have an important bearing upon this suit, for in such proceeding the operation of the Plan then and now in effect at the Fore River Plant and the relations between the Shipbuilding Corporation and its employees there were described at length by witnesses and were thoroughly considered. The questions which were involved in the First Fore River Case were fundamentally the same as the main questions involved in this suit (Bill, par. 18, R., p. 16).

On February 13, 1935, or about 4½ months after the date of the first hearing in the First Fore River Case, the Old Labor Board unanimously decided that the Shipbuilding Corporation was not guilty of the charges made against it and refused to take the action against it which had been requested by Local 5 of the Industrial Union (Bill, par. 16, R., p. 14).

The out-of-pocket cost to the Shipbuilding Corporation in connection with the First Fore River Case was in excess of $15,000, and the hearings in such Case consumed a total of 2,500 hours of working time of employees, foremen and leading men, and also caused the loss of many more hours in connection with and in preparation for such hearings. Such hearings, similarly, caused a loss of time of important officials of the Fore River Plant, particularly the Vice-President of the Shipbuilding Corporation in charge of all of its plants and also the General Manager and As-

sistant General Manager of the Fore River Plant, who spent by far the greater part of the month of October, 1934, in connection with such hearings (Bill, par. 17; R., pp. 14-16; Aff. Collins, R., pp. 102-104).

The Shipbuilding Corporation also suffered damage (more serious, in fact, than that above described) as a result of such Case in the disturbance caused to its employees and apprehension which they manifested, which resulted in the lowering of their morale and gave rise to unsettled conditions among them which impaired the efficiency of the operations of the Fore River Plant and impeded operations there (Aff. Collins R., p. 103; Supp. Aff. McDermott R., pp. 109, 185-186).

Subsequent to the date of the decision of the First Fore River Case and prior to the commencement of this suit, there was no change in the operation of the Plan, or in the policy of the Shipbuilding Corporation, with respect thereto (Bill par. 18; R., p. 16; Aff. Homer, R., pp. 98-99).

The holding of the scheduled hearing and the taking of any further proceedings in connection therewith, regardless of the outcome thereof, will seriously interfere with the harmonious relations which exist between the Shipbuilding Corporation and its employees, and will cause a lowering of the efficiency of the employees at the Fore River Plant, and will result in great damage which cannot be accurately estimated (Bill par. 19; R., pp. 17-19).

These facts are established by affidavits showing that there had been disseminated among the employees of the Shipbuilding Corporation at the Fore River Plant and throughout the surrounding communities much false propaganda, and it is the opinion of the General Manager of the Plant and of leading representatives of the employees that

the holding of the scheduled hearing, and the taking of proceedings in connection therewith, will seriously damage the friendly, pleasant and harmonious relations between the Shipbuilding Corporation and its employees, and will seriously affect the morale of the employees (Aff. Gould R., pp. 92-93; MacKenzie R., pp. 108, 169; Harvey R., pp. 108, 172).

The order granting the preliminary injunction stated that it appeared

> "that the issuance of a preliminary injunction is necessary to prevent immediate and irreparable damage, for the reason that the holding of any hearing for the purpose of determining whether or not the plaintiff [the Shipbuilding Corporation] has engaged at its Fore River Plant in any so-called 'unfair labor practices' under the National Labor Relations Act, or taking any action with respect thereto, would involve expense to the plaintiff which it could not recover, absence of its officials and employees from their work, which would interfere with the operation of the plaintiff's Fore River Plant, and disturbance of harmonious relations with its employees" (R., p. 113).

Similarly, one of the conclusions of law of the District Court upon the granting of the preliminary injunction was that

> "The plaintiff [the Shipbuilding Corporation] will suffer irreparable damage of the kinds alleged in its bill of complaint if any hearing is held" (R., p. 112).

Such order granting the preliminary injunction also stated that

> "immediate, continual and irreparable loss and damage to the plaintiff [the Shipbuilding Corpora-

> tion] will result unless a preliminary injunction is granted" and

that it did not appear that the Shipbuilding Corporation had

> "a plain, adequate and complete remedy at law" (R., p. 113),

and one of the conclusions of law was to the same effect (R., 112).

Furthermore, in its opinion on the motion of the petitioners to dismiss the bill of complaint (which was denied), which opinion was delivered after the case had been thoroughly briefed, the District Court said

> "The danger threatened is immediate and great" (R., p. 123).

The Court of Appeals unanimously affirmed the District Court, and in its opinion, after quoting the description of the business of the Shipbuilding Corporation in the complaint of the Labor Board, said

> "The employees of such a business are not engaged in interstate commerce nor in a business within the jurisdiction of the Board and, if not, the Board is acting without authority and in violation of law" (R., pp. 231-232).

The Court of Appeals then went on to say:

> "On the somewhat unusual facts in this case, *viz.*, the long established plant association and the long established amicable and satisfactory relations between the plaintiff and its employees fostered by it, it might well be held that irreparable injury would be caused by an investigation calculated to disturb

> those relations and that neither plaintiff [the Shipbuilding Corporation and the employee plaintiffs in No. 182] had an adequate remedy at law. Both the Shipbuilding Company and its employees have a right that the established friendly relations between them shall not be injured without legal justification. It cannot be said that the District Judge erred in finding and ruling that the plaintiffs had no adequate remedy at law or in finding and holding that danger of irreparable injury was shown and that, considering the doubt as to the Board's jurisdiction, the plaintiffs were entitled to preliminary injunctions" (R., p. 232).

After that decision of the Court of Appeals this Court handed down its opinions in the five cases involving the Act rendered April 12, 1937, and the petitioners filed a motion for leave to file a second petition for rehearing, a first petition having already been denied prior to such decisions of this Court. In denying such motion for leave to file the second petition for rehearing the Court of Appeals said:

> "It is obvious that the business here in question as described in the finding of the District Judge is very different in character from the 'far-flung' enterprises of the Jones & Laughlin Steel Corporation, or from the essentially interstate businesses involved in *National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co.* and *National Labor Relations Co.* [*sic.*] v. *Fruehauf Trailer Co.* In applying the test laid down in the Jones & Laughlin opinion to individual business organizations some uncertainty as to which are under federal control in their relations with their employees and which under state control will at first be unavoidable. When the question is raised, as in this case, we think it

devolves on the National Labor Relations Board to show that the business involved is probably within its jurisdiction. *On the findings of the District Judge that fact is not established in the present case.* We think the case should stand for final hearing in the District Court" (Italics ours) (R., p. 243).

ARGUMENT

I.

A PRELIMINARY INJUNCTION SHOULD NOT BE DISTURBED ON APPEAL EXCEPT FOR IMPROVIDENT ALLOWANCE, VIOLATION OF THE RULES OF EQUITY OR ABUSE OF DISCRETION.

One of the principles of law most thoroughly established by the decisions of this Court is that the decree of a District Court granting a preliminary injunction "will not be disturbed on appeal except for improvident allowance, violation of the rules of equity or abuse of discretion". *Rogers* v. *Hill,* 289 U. S. 582, 587 (1933); *Prendergast* v. *New York Telephone Company,* 262 U. S. 43, 50 (1923).

II.

THE DISTRICT COURT DID NOT ACT IMPROVIDENTLY, VIOLATE ANY RULE OF EQUITY OR ABUSE ITS DISCRETION.

1. The District Court Did Not Act Improvidently or Abuse Its Discretion.

As pointed out above, the District Court found that immediate, serious and irreparable damage would result

unless a preliminary injunction were granted and the Court of Appeals held that it did not err in so finding (see pp. 10-12, *supra*). We submit that this Court, following its usual practice, should not upset the concurrent findings of fact of the two lower courts.

Moreover, the courts below found that no harm could come from staying the proceedings until a final hearing and, consequently, that the balance of convenience favored the granting of the preliminary injunction* (R., pp. 111, 123).

Where there exists substantial doubt with respect to the constitutionality of the application of an act to a plaintiff and where there is likelihood that the application of such an act to such plaintiff would cause it damage and injury, and where the remedy purportedly afforded by such act is not as timely, plain, adequate or complete as the remedy which equity might afford, the question of whether or not a preliminary injunction maintaining the *status quo* should or should not be granted rests in the sound discretion of the District Court. *Ohio Oil Co.* v. *Conway*, 279 U. S., 813, 815 (1929). The District Court found, in effect, that this suit presented just such a situation and, accordingly, granted the preliminary injunction herein which was affirmed by the Court of Appeals in the decision to review which certiorari is sought.

Unless the view of the District Court is entirely without basis, unless this Court shall find that the District

*As a matter of fact, if the petitioners had proceeded in the District Court instead of taking an appeal to the Court of Appeals, or even if they had proceeded therein after the decision of the Court of Appeals, instead of bringing this petition for certiorari, this suit might well have been determined on its merits before now by the District Court.

Court, or the Court of Appeals in affirming the District Court, acted arbitrarily and abused its judicial discretion or violated some rule of equity in granting the preliminary injunction, or in affirming its issuance, this Court should deny the petition for certiorari to review the decision of the Court of Appeals.

In this situation it is obvious that the court below did not act improvidently or abuse its discretion, and the only question is whether it had any jurisdiction in the premises. We contend that it did have such jurisdiction.

2. The Labor Board Has No Jurisdiction Over Relations Between the Shipbuilding Corporation and Its Employees.

This Court in its recent decisions in the cases involving the Act expressly recognized the fact that the scope of the Act and "the grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers" and that the terms of the Act "do not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce" and that the Act "purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds". *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation, supra.*

As pointed out by the Court of Appeals in the above quoted excerpt from its decision (p. 12, *supra*) the business of the Shipbuilding Corporation at the Fore River Plant is very different from the businesses involved in such recent decisions of this Court.

We submit that in the light of numerous decisions of this Court, particularly those in *Carter* v. *Carter Coal Co.*, 298 U. S. 238 (1936), and *Schechter Corporation* v. *United States*, 295 U. S. 495 (1935), the National Labor Relations Act cannot be applied to the Shipbuilding Corporation at its Fore River Plant and to its relations with its employees there.

The Act is grounded solely upon the power of the Federal Government to regulate interstate commerce and was sustained by this Court as having a field of constitutional application on that ground. *The Associated Press* v. *National Labor Relations Board, supra; National Labor Relations Board* v. *Jones & Laughlin Steel Corporation, supra.* The Act cannot constitutionally be applied to the Shipbuilding Corporation, because the commerce clause of the Federal Constitution does not give to Congress the power to legislate with respect to any matters which do not constitute interstate or foreign commerce or directly or intimately affect such commerce. *Schechter Corporation* v. *United States, supra; Carter* v. *Carter Coal Co., supra; National Labor Relations Board* v. *Jones & Laughlin Steel Corporation, supra.* As this Court said in the *Jones & Laughlin* case (at p. 621 of 57 Sup. Ct.):

> "The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several states' and the internal concerns of a state. That distinction between what is national and what is local in the activities of commerce is vital to our federal system."

The outstanding, significant facts bearing upon the jurisdiction of the Labor Board in this suit are the follow-

ing: The employees involved herein are engaged solely in intrastate activities. The Shipbuilding Corporation does not ship any of its products in interstate commerce, but delivers all of them to purchasers at the Fore River Plant. The relations between the Shipbuilding Corporation and its employees at that Plant do not tend to lead to disputes burdening or obstructing interstate commerce or the free flow thereof.* It is clear that a strike or other labor trouble at the Fore River Plant would not directly affect interstate commerce and that it would have no such intimate effect upon interstate commerce as has been held by this Court to be necessary in order to give Congress jurisdiction.

There has been no labor trouble at the Fore River Plant for more than thirteen years and no trouble or strike is threatened or even suggested. The employees are satisfied with the Plan of Employees' Representation now in effect

*Regardless of the impossibility of applying the Act constitutionally to the Shipbuilding Corporation and its relations with its employees, because of the local nature of its business, the application of the provisions of the Act to the Shipbuilding Corporation sought to be made by the Labor Board in its complaint involved in this suit, by destroying the Plan and forcing a change in the now satisfactory method by which collective bargaining is conducted at the Fore River Plant, would violate the right constitutionally guaranteed to each employer, including the Shipbuilding Corporation, to contract and bargain freely with his employees, as well as the right constitutionally guaranteed to employees, including those of the Shipbuilding Corporation, to contract and bargain freely with their employers, which rights are property rights. *Adair* v. *United States*, 208 U. S. 161 (1908); *Coppage* v. *Kansas*, 236 U. S. 1 (1915); *Hitchman Coal & Coke Company* v. *Mitchell*, 245 U. S. 229 (1917); *The Virginian Railway Company* v. *System Federation No. 40, etc.*, 300 U. S. 515 (1937); *The Associated Press* v. *National Labor Relations Board, supra; National Labor Relations Board* v. *Jones & Laughlin Steel Corporation, supra; National Labor Relations Board* v. *Fruehauf Trailer Co., supra; National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co., Inc., supra; Washington, Virginia & Maryland Coach Co.* v. *National Labor Relations Board, supra.*

at the Fore River Plant and desire to continue collective bargaining under it. As appears from the bill filed by employees and the findings of the District Court in their suit, the employees believe that the holding of the scheduled hearing by the Labor Board would destroy confidence in the Plan, would upset friendly relations and would lead to labor troubles and disputes (R., p. 159). There is, therefore, no basis for believing that the holding of the scheduled hearing would have anything except a bad effect upon production at the Fore River Plant and the carrying on of the activities of any other business that may be dependent upon such production.

Moreover, this suit involves the so-called unfair labor practice defined in subdivision (2) of Section 8 of the Act having to do with the formation or administration of labor organizations, or the contribution of support to them. That unfair labor practice was not involved in any of the five decisions of this Court under the Act, rendered April 12, 1937. The application of that unfair labor practice to the Shipbuilding Corporation and its relations with its employees which the Labor Board is attempting to make in the scheduled hearing and in the proceedings in connection therewith, amounts to an unconstitutional* intrusion in the now satisfactory relations between the Shipbuilding Corporation and its employees with respect to the method and manner by which they collectively bargain with each other.

3. The Damage that Would Be Suffered by the Shipbuilding Corporation Is Cognizable in Equity.

The decisions of the courts clearly establish that the situation presented by the complaint of the Labor Board

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*See cases cited in footnote, p. 17.

and the hearing scheduled thereon is one in which the equity jurisdiction of the District Court may properly be invoked to prevent damage which would be incurred by the Shipbuilding Corporation as a result of the chain of events set in motion by the scheduled hearing. *Watson* v. *Sutherland,* 5 Wall. 74 (1866); *Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925); *Walla Walla* v. *Walla Walla Water Co.,* 172 U. S. 1 (1898); *Hitchman Coal & Coke Company* v. *Mitchell, supra* (1917); *Pennsylvania* v. *West Virginia,* 262 U. S. 553, 592, 593 (1923); *City Bank Farmers Trust Co.* v. *Schnader,* 291 U. S. 24, 34 (1934).

It is clear also from the decisions of the courts that the damage to the Shipbuilding Corporation which would result from the holding of the scheduled hearing and the taking of proceedings and action in connection therewith is irreparable damage and is cognizable as such in equity. Instances in which this Court has recognized as irreparable damage cognizable in equity interferences with employment relationships fundamentally the same as those being attempted by the petitioners and the Labor Board herein are *Truax* v. *Raich,* 239 U. S. 33 (1915); *Hammer* v. *Dagenhart,* 247 U. S. 251 (1918); *Terrace* v. *Thompson,* 263 U. S. 197, 215, 216 (1923); *Euclid* v. *Ambler Realty Co.,* 272 U. S. 365, 386 (1926).

4. The Remedy Afforded to the Shipbuilding Corporation by the National Labor Relations Act Is Entirely Inadequate.

The holding by the petitioners of a hearing in the name of the Labor Board, and the taking by them of proceedings in connection therewith, is imminent, and is only prevented by the existence of the preliminary injunction, and the

Shipbuilding Corporation has no remedy at law whatsoever, or at least there is no remedy at law available to the Shipbuilding Corporation which is timely, plain, adequate or complete, to prevent irreparable damage and injury which it would suffer from the holding of such hearing and the taking of such proceedings.

Under the Act the control of the proceeding is entirely in the hands of the Labor Board and its agents and agencies, until it shall issue a cease and desist order. It will be a long time (if ever) before the Shipbuilding Corporation can have the opportunity of questioning before a court (except in this suit) the jurisdiction of the Labor Board and the applicability of the Act to the Shipbuilding Corporation and its relations with its employees. In the meantime, serious and irreparable injury will result to the Shipbuilding Corporation from the disturbance of the harmonious relations which exist between it and its employees. Moreover, it may well happen that the Shipbuilding Corporation will suffer all the attendant inconvenience, damage and loss resulting from the scheduled hearing and that the Labor Board will fail to enter any order reviewable by a court. The remedy afforded by the Act is not adequate and the Shipbuilding Corporation is entitled to the relief granted by the preliminary injunction. *Boyce* v. *Grundy,* 3 Peters 210, 215 (1830); *Kilbourn* v. *Sunderland,* 130 U. S. 505, 514-515 (1889); *Walla Walla* v. *Walla Walla Water Co., supra; Fredenberg* v. *Whitney,* 240 Fed. 819, 822-823 (D. C. W. D., Wash. N. D., 1917). See also: *Davis* v. *Wakelee,* 156 U. S. 680, 688 (1895); *Ex parte Young,* 209 U. S. 123 (1908); *Hitchman Coal & Coke Co.* v. *Mitchell, supra; Union Pacific R. R. Co.* v. *Weld County,* 247 U. S. 282, 287 (1918);

Wallace v. *Hines,* 253 U. S. 66, 68 (1920); *Dawson* v. *Kentucky Distilleries Co.,* 255 U. S. 288, 296 (1920). We do not understand that the principles laid down and applied in these cases have been rejected in any of the later cases cited in the petition.

Moreover, on an appeal from an order of the Labor Board, the Act does not permit independent judicial determination of the fundamental or jurisdictional facts involved. For that reason, also, the remedy afforded by the Act is inadequate. *Crowell* v. *Benson,* 285 U. S. 22 (1932). Under the Act all findings of fact of the Labor Board are conclusive upon the Circuit Courts of Appeals in any proceeding to review any order of the Labor Board, if there should be evidence (even hearsay) to support such finding (§10(b) and (e)). A vital and fundamental question which lies at the very threshold of the proceeding of the Labor Board involved in this suit is whether or not the business of the Shipbuilding Corporation and its relations with its employees at its Fore River Plant involved in such proceeding constitute interstate or foreign commerce or directly affect such commerce or are intimately and closely related thereto. That is a jurisdictional question and is one which can only be determined with finality by a constitutional court upon the basis of a record adduced before it. Any other procedure would deprive the Shipbuilding Corporation of its liberty and property without due process of law and would prevent the courts from exercising their constitutional function. The Act attempts to do both, for it contains no provisions permitting an independent judicial determination of such fact, but it purports, as pointed out above, to make *all* findings of fact of the Labor Board conclusive upon the Circuit Courts of Appeals in proceedings

provided for by the Act, if there shall be evidence (even hearsay) to support such findings.

III.

CONCLUSION.

The petition should be denied.

Respectfully submitted,

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